146 US 233

RECORD, CASE No. 13,568.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. ~~368~~ 44

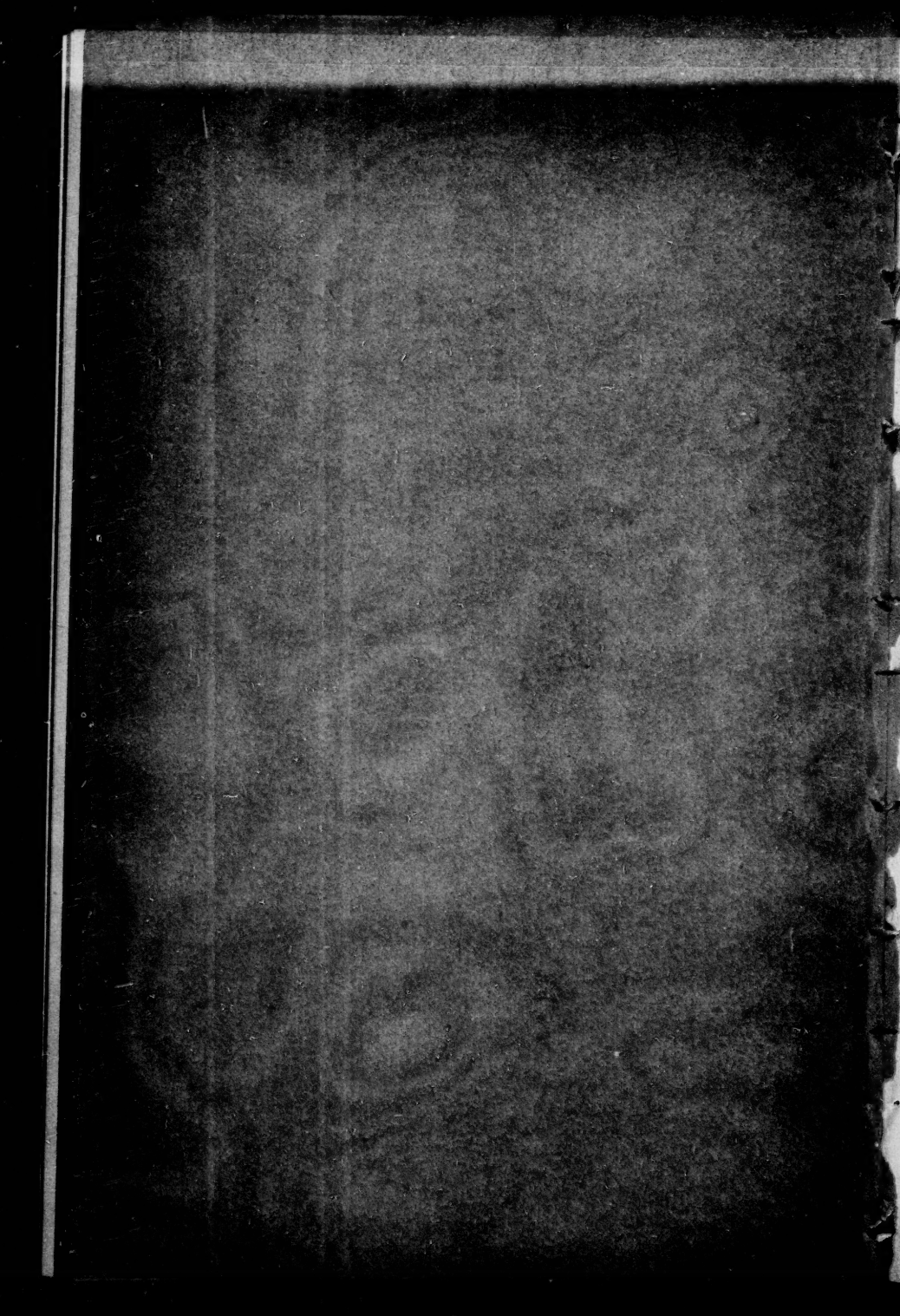
HENRY JUNGE, PLAINTIFF IN ERROR,

vs.

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 8, 1889.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Henry Junge, plaintiff, and Edward L. Hedden, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN A. SHIELDS, *Clerk.*

[Seal of U. S. Circuit Court, South. Dist. New York.]

The foregoing writ is hereby allowed.
E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 799. No. 11087. U. S. Supreme Court. Henry Junge, plaintiff in error, against Edward L. Hedden, defendant in error. Writ of error. Charles Curie, Esq., 44 Exchange place, N. Y. city, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 5th day of December, 1888. A copy of the within paper has been this day received at this office. Dec. 5, 1888. Stephen A. Walker, attorney for defendant in error, U. S. attorney. [Stamped:] U. S. circuit court. Filed Dec. 5, 1888. John A. Shields, clerk. 1.45, ch'd.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case

of Henry Junge, plaintiffs in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this second day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

HENRY JUNGE, Plaintiff,
against
EDWARD L. HEDDEN, Defendant. } Summons. No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, July 1st, 1886.

CHAS. CURIE,
Plaintiff's Attorney.

Office: No. 44 Exchange place, New York city.

(Endorsed:) 11087. No. 1. N. Y. superior court. Henry Junge, plaintiff, against Edward L. Hedden, defendant. Summons. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Due service hereof admitted this 1st day of July, 1886. U. S. attorney's office. Rec'd July 3, 1886.

4 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edward L. Hedden, defendant, by Henry Junge, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 19th day of July, 1886, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

[L. S.]

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme

Court of the United States, the 15th day of July, in the year one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

5 (Endorsed:) 11087. U. S. circuit court. H. Junge *vs.* Edward L. Hedden. Copy. Certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, July 15, 1886. Chas. Curie, plaintiff's attorney.

6 Circuit Court of the United States for the Southern District of New York.

HENRY JUNGE, Plaintiff,
against
EDWARD L. HEDDEN, Defendant. } Complaint.

Plaintiff complains—

1st. That defendant was during the time hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiff was during said times in trade under the firm name of Henry Junge, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant as such collector exacted from plaintiff as and for duties thereon and plaintiff, in order to obtain said goods, was compelled to pay and did pay the sum of one hundred & sixty-six & $\frac{74}{100}$ dollars in excess of the amount required by law.

4th. That plaintiff filed with said defendant due and timely protests in writing, upon each entry of said goods, against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto and also as above stated.

5th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision
7 of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforasaid has never been repaid to plaintiff and is still due and owing to him.

Wherefore plaintiff demands judgment against defendant for one hundred & sixty-six & $\frac{74}{100}$ dollars, with interest on the several

sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiff.

(Endorsed:) 11087. U. S. circuit court. Henry Junge, plaintiff, against Edward L. Hedden, defendant. Complaint. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office. Jul- 27, 1886.

Bill of Particulars.

Name of importer, H. Junge.

		Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
158	1	Dental rubber	Hamburg	Rugia	1885.	1885.		1885.	1885.	1886.	1886.
	2	"	"	"	June —	June 12	14 65	July 7	July 9	July 9	Ap'l 7
	3	"	"	Suevia	July —	July 29	6 90	" 29	Aug. 26	Aug. 26	May 1
	4	"	"	Bohemia	" 23	Aug. 11	14 00	Aug. 11	Sept. 26	Sept. 26	Ap'l 7
	5	"	"	Rhaetia	" 4	July 23	8 55	July 23	" 26	" 26	" 7
	6	"	"	Frisia	" 18	Aug. 3	12 15	Aug. 3	Oct. 2	Oct. 2	" 7
	7	"	"	Rugia	Aug. 10	" 25	13 85	" 25	" 16	" 16	" 7
	8	"	"	"	" 22	Sept. 8	7 45	Sept. 8	" 28	" 28	" 7
	9	"	"	"	Oct. 3	Oct. 13	12 25	Oct. 21	Dec. 24	Dec. 24	June 5
	10	"	"	Moravia	Sept. 12	Sept. 29	9 35	Sept. 29	1886.	1886.	
	11	"	"	Suevia	Oct. 17	Nov. 5	7 10	Nov. 5	Jan'y 14	Jan'y 14	" 5
	12	"	"	Rhaetia	Aug. 25	Sept. 15	3 24	Sept. 16	" 14	" 14	" 5
	13	"	"	Bohemia	Sept. 26	Oct. 16	8 00	Oct. 16	" 25	" 25	" 5
	14	"	"	Moravia	Oct. 24	Nov. 12	10 00	Nov. 12	" 25	" 25	" 5
	15	"	"	Lessing	" 31	" 17	3 75	" 17	" 25	" 25	" 5
	16	"	"	Gelbert	Dec. 12	Dec. 30	13 00	Dec. 30	Feb. 5	" 5	" 5
	17	"	"	Rugia	Nov. 14	" 1	10 00	" 1	" 12	" 12	" 5
			"	Suevia	" 28	" 17	22 50	" 17	" 20	" 20	" 5

9 [Endorsed:] 11087. U. S. circuit court, southern district of New York. Henry Junge against Edward L. Hedden. Bill of particulars. New York, July 27, 1886. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, July 27, 1886.

10 Circuit Court of the United States for the Southern District of New York.

HENRY JUNGE
versus
EDWARD L. HEDDEN, Collector, etc.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs *were* compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

11 V. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 (Endorsed:) 11087. U. S. circuit court, southern district of New York. Henry Junge *vs.* Edward L. Hedden, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney

for defendant. Due service of a copy of the within answer is hereby admitted. New York, August 19, 1886. Chas. Curie, plaintiff's attorney. To C. C., plaintiff's attorney.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday & Monday, the 5th & 9th days of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

HENRY JUNGE
vs.
EDWARD L. HEDDEN. } 11087.

Now comes the plaintiff, by Stephen G. Clarke, Esq., his attorney, and moves the trial of this cause; also comes the defendant, by Macgrane Coxe, Esq., ass't U. S. att'y, his attorney; thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel the jury, by direction of the court, find a verdict for the defendant; stay of sixty days granted to plaintiff to make and serve a case, with leave to turn the same into a bill of exceptions.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

14 United States Circuit Court, Southern District of New York.

HENRY JUNGE
vs.
EDWARD L. HEDDEN. } Judgment. N. S. 11087.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury at a circuit court of the October term, 1887, and the issues having been tried and a verdict for the defendant having been duly rendered on the ninth day of January, 1888, and his costs having been adjusted at $48.85—

Now, on motion of Stephen A. Walker, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this sixth day of March, 1889.

JOHN A. SHIELDS, *Clerk.*

15 HENRY JUNGE
vs.
EDWARD L. HEDDEN. }

On motion of Stephen A. Walker, att'y for def't, it is—

Ordered that the clerk enter the above judgment upon the records of this court *nunc pro tunc* as of the first day of December, 1888.

Dated New York, March 6th, 1889.

E. HENRY LACOMBE, *Judge.*

(Endorsed:) 11087. United States circuit court. Henry Junge *vs.* Edward L. Hedden. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Mar. 6, 1889, *nunc pro tunc* as of Dec. 1, 1888, 1.55 p. m. John A. Shields, clerk.

16 U. S. Circuit Court, Southern District of New York.

HENRY JUNGE *vs.* EDWARD L. HEDDEN. } Bill of Exceptions.

Afterwards and on the fifth day of January, 1888, at a stated term of this court held in the city of New York, the issues in this case came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury duly empaneled to try the issues therein.

Plaintiff introduced evidence tending to show that during the year 1885 he made entry with the defendant, as collector of customs of the port of New York, of certain rubber, on which the defendant assessed and plaintiff paid a duty of twenty-five per cent. ad valorem; that in respect to this assessment in question plaintiff protested, appealed, and brought suit, the substance of the protests being as follows:

"Upon certain 'India rubber' in sheets, claiming said goods to be entitled to free entry under the provisions in the free list for 'India rubber' crude, act M'ch 3d, '83; or, second, if deemed not crude, it is nevertheless not a manufactured 'article of rubber' in the meaning of the law, but is entitled to free entry under the proviso of sec. 2499 of said act as crude; or, third, at no more than 20 % ad val., as a partially manufactured, non-enumerated article, under sec. 2513, act M'ch 3, '83. See sec. 23d, act M'ch 2, 1861, as to rubber in sheets, and not at 25 % ad val., *or* charged by you."

17 Plaintiff also produced in evidence samples of the rubber in question, marked Exhibits 18 and 19.

The plaintiff, having been duly sworn, then testified in his own behalf as follows:

The crude rubber in this state has been merely cleaned and subjected to a rolling mill, and in this instance (referring to Exhibit 19) sulphur and a coloring material incorporated, and in 18 merely the crude Para rubber and sulphur mixed together and then put into this shape that is represented here. On the back of the sheet is book-binder's cloth merely for the purpose of keeping those individual leaves from sticking together, and is thrown away after the rubber has been used by the dentist. We sell the rubber exclusively to dental depots and dentists; nobody else can use it but those (producing a specimen). This represents the finished plate after it has gone through sundry preliminary processes. The impression of the patient's mouth is taken in plaster of Paris, and afterwards from the mold this is started and subjected to vulcanization, and the result is this plate—either of these. This is the regular article as finished by the dentist.

(The five specimens produced by the witness and marked in evidence Exhibit 20.)

Those plates are vulcanized.

Being cross-examined by defendant's counsel, witness testified:

I am an importer of these goods. I also import combs and stationer's articles, pen-holders, &c., telegraphic supplies, telephone handles, and match-safes.

18 Q. Do you import crude rubber?

A. Yes; I do, too.

Q. Also crude rubber?

A. Yes.

Q. Have you a sample of crude rubber with you?

A. Yes; here it is.

(Sample of crude rubber marked in evidence Exhibit 21.)

I have been brought up in our factory in Hamburg. Dental rubber is made in this country by somebody; some of it, not all. It is not made by any other houses in Germany that I know of. There may be one or two, but they do not export any rubber here, I do not think. This is a special brand, which partly is a secret—the manufacture of dental rubber. Maybe somebody else knows the secret of manufacturing, but I do not think so; I never knew of anybody else knowing it. I know a man manufactures a pink rubber, but that does not come under the denomination of what we have imported. Here is the crude rubber, which is put into a mill and the sulphur and the coloring material added and simply rolled out into sheets, and this is the result. The crude rubber is put into what we call technically a grinder and the sulphur and the coloring material added, the mill itself has a heat, but it does not vulcanize. It is not a vulcanizing heat; it is not sufficient to reduce the rubber to a liquid state, but it gets elastic. The process from the crude state right through till it is finished in the state in which it is here takes, perhaps, an hour and a half. It all depends on the batch. In this instance the coloring material is worth about the fourth part of the rubber. There is nothing more put in except the sul-

19 phur. The proportion of the value of the sulphur is a secret I do not propose to give to anybody. The component materials of No. 18 are rubber and sulphur; nothing else. The value of the crude rubber in No. 19, as it appears by the invoices in the foreign market, is about sixty cents a pound; No. 18 is about the same. It is only the approximate price of sixty cents. I do not mean to say the exact price; only approximate. The foreign value is about sixty cents. No. 18 is worth 60 cents and No. 19 is worth 58 cents. The rubber is worth more without the coloring matter than it is with it, because the coloring material does not cost as much as the crude rubber. As to bulk, the rubber is predominant over the other ingredients in Exhibit 18 and 19 naturally. I know how to make a plate from its crude state to its perfection. I have made plates.

Being further examined by counsel for plaintiff, witness testified:

The articles manufactured of rubber imported into this country, to my knowledge, are combs, telephone handles, knobs, key-knobs, door-knobs, match-safes, and a dozen other, which I import myself.

EDWARD MCCORMICK, a witness on behalf of the plaintiff, being duly sworn, testified in substance as follows:

I am a manufacturer of rubber or working at rubber. I am familiar with samples 18 and 19. We take the crude material and put it through rolling machines or grinders, as we call them. We make some here and grind the material with it. This is the way it is left until it is really manufactured for use, which would be in this state. It cannot be used for any other purpose. It is of
20 no use whatever in its present state. It could not be used for anything, except to manufacture plates like Exhibit 20. It is worthless for any purpose only to make the plates of.

(The witness produces plates.)

These are similar to the others. The only difference is in the colors; some are lighter shaded and some darker; some that are even black. I manufacture them for dentists' use. The process is this: The impressions are taken of the mouth in plaster of Paris; the rubber is then simply laid on; then they are subjected to a heat of at least 320 degrees for fifty minutes or fifty-five minutes, until they are finished in this state. After the teeth have been set in the plaster, then they come out in that state (indicating). Then they have a buffing machine that they polish them off with, so as to give them a nice color. This is the sole use and object of that material. (Exhibits 18 and 19.)

Plaintiff then rests.

CHARLES A. SYKES, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am an importer of dental goods of all kinds at No. 30 East 14th street, N. Y.; have been in that business about fifteen years. The head house is in London. They have branches throughout Europe and they have a branch here. The house is Claudius Ash & Sons. We deal very largely in dental goods. Am familiar with the names under which various dental goods are bought and sold. Exhibit 18 is what is generally understood by the name "dental rubber," and the same with respect to 19. It does not matter
21 what the color is or whether there is no color in it at all, it is all termed dental rubber and I import it under that name. We buy crude rubber from which we manufacture this to the state of either of these samples, Exhibits 18 and 19.

(Witness shown piece of material.)

This is crude rubber, bought and sold under that name in trade and commerce.

The piece of material is marked in evidence Exhibit A.

I have never manufactured dental rubber myself or assisted in the manufacture, although I have seen some made. The crude rubber is placed in what we call a masticator; this is the name we have; it is just the same as a grinding machine, and the rubber is torn up and shredded until it is got into a state of pulp and the color is added and the sulphur, and when it comes out from that process it is rolled into sheets and brought into this state; then boxed and exported. The length of time it takes to change the crude rubber into the dental rubber depends upon the bulk of rubber that is being done—the weight of rubber that is being put through the masticator; but the whole process could be gone through in half an hour—that is, until it is properly masticated and cleansed and the coloring added; then it would have to be pressed into shape and put into rolling mills to get into these shapes and cut. To put a batch through all the machinery would take from an hour and a half to two hours; then it would be ready to have this backing put on, which is put on by girls—just this linen backing—to prevent its sticking together. It would be ready for that process. This can be done almost as quick as you could turn over the pages of a book.

22 When I speak of dental rubber I mean rubber for dental purposes, and when applied to this particular sort it means rubber to make plates out of for dentists' use.

Being further examined by counsel for defendant, witness testified:

I would not think of giving any one either Exhibit 17 or 18 for crude rubber. It would be impossible to make a dental plate such as this (indicating) from crude rubber. It is not possible to vulcanize crude rubber without the addition of some other substance.

Being cross-examined by counsel for plaintiff, witness testified:

The reason why your cannot make a dental plate from crude rubber like sample A directly is that it would require the addition of some sulphur. The sulphur being added, there would be no difficulty in vulcanizing. If you wanted it colored you would have to add the coloring.

Witness was then asked by counsel for the defendant to state to the jury the market value per pound of rubber represented by Exhibit A in this market in the early part of 1883. To this question plaintiff's counsel objected. The court overruled the objection, and counsel for the plaintiff excepted and the exception was duly allowed.

I know what the market rates are for dental rubber, because I know what had been purchased and I knew the prices. These prices were all listed. I knew what the prices of these articles were at the time; but with respect to crude rubber, I did not buy any crude rubber. The value of dental rubber in 1883 was a dollar and a half a pound.

Being cross-examined by plaintiff's counsel, witness testified:

23 The price of the dental rubber was a dollar and a half a pound in this market in 1883, and in Europe it was about the same price. I bought it in Germany, in France, and England. The value has not decreased in the European market. It was not as low as fifty-five or sixty cents a pound in the European market in 1885. Personally I have never bought any rubber like samples 18 and 19. I know that it has never been sold in European markets for sixty cents a pound. If a man offered it to me at sixty cents, I should know that he has come by it through improper means. I never bought any at that price or at any other price. I did not buy personally myself, but the house that I represent in this country bought it, and they are large dealers in it, and I should know of my own knowledge whether that was worth sixty cents or whether it was worth more or less. The house that I represent has the reputation of being the largest house in the world, having branches in Liverpool, Manchester, Paris, Berlin, Vienna, Hamburg, Copenhagen, and St. Petersburg.

EUGENE DOHERTY, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

Exhibits 18 and 19 are bought and sold in trade and commerce as dental rubber. Exhibit A is bought and sold in trade and commerce as crude rubber, or Para rubber. Exhibits 18 and 19 are never bought and sold in commerce as crude rubber. Crude rubber is used to make shoes, boots, coats, hose, belting, rubber combs, and thousands of articles. Exhibits 18 and 19 are used exclusively for dental purposes. Nothing else is done to it before it is used

24 by the dentist, that I know of.

Witness was then asked if com-ercially any further manipulation of it before it reached the dentist would or would not spoil it for the dentist's purposes. Counsel for plaintiff objected to the question. The court overruled the objection and plaintiff's counsel excepted, and the exception was duly allowed.

I believe it would spoil it for dental purposes.

Witness was then asked if, in the state in which the dental rubber now is, it is or is not spoiled for any other purpose, com-ercially speaking. Counsel for plaintiff objected to the question. The court overruled the objection and plaintiff's counsel excepted, and the exception was duly allowed.

Witness then said it was spoiled for any other purpose.

I will take Exhibit A and describe the process of manufacture from the beginning. We take this and soak it in water for one week or three or four days. Then we cut it with a circular saw without any teeth in it, running probably two thousand revolutions a minute. After it is cut it is passed through a washing machine. That is washed (showing a piece of rubber). It is seasoned for a month or three months if we can have it.

The specimen of washed rubber produced by the witness is marked Exhibit B.

Then it is taken and broken in that way. We call it breaking; worked on a machine of this kind (showing a picture of a machine); worked there for an hour or more, and then, after that is done, we put in the sulphur and vermillion—anything you choose; sulphur and vermillion are generally used—and it is mixed in that way (showing sample) with this same machine. It is of no use unless we put sulphur in it. Sulphur and vermillion is the principal compound. Then, after we get through with that, we roll it on another machine, and then it is rolled up and cut in sheets, put in a box of this kind, and done up in this way in muslin (showing sample). That is what we call "manufactured dental rubber" for that purpose. Now it is fit for the market. That is the whole thing in a nutshell. That is it, manufactured and ready for the market; put it up in boxes.

Being cross-examined by plaintiff's counsel, witness testified:

Exhibit 20 is the plates. Exhibits 18 and 19 are not raw material; they are manufactured articles. Exhibit A is the raw material. If a man orders raw rubber I would sell him Exhibit A. If he wants dental rubber I would sell him dental rubber. I am a manufacturer of the article, Exhibits 18 and 19. Those plates are made from dental rubber. Exhibit B is partly manufactured. We sell it as partly manufactured—washed. If you were going to buy any you would ask for washed, seasoned rubber. It is soaked in water for about a week and then cut with a saw; that has been probably seasoned for going on two months. Exhibit A has been cut with a knife. It is supposed to flow out of the trees in just that shape, and the natives gather it up. It comes in large cakes; large and small; various kinds. Some weigh fifty pounds, some five, some one. I have seen them count up as high as seventy pounds in a cake, just as they happen to flow from the tree. It runs out in layers as it runs from the tree, as I understand it. I never saw it run.

Being further examined by counsel for defendant, witness testified:

The plates here are made from such material as Exhibits 18 and 19 by the dentist in his private office.

F. C. Armstead, a witness on behalf of the defendant, being sworn, testified in substance as follows:

Exhibits 18 and 19 are bought and sold in trade in this country as dental rubber. Exhibit A is bought and sold in this country as crude rubber.

A. D. Schlesinger, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am an importer of India-rubber goods and have been in the business nearly forty years. Exhibits 18 and 19 are bought and sold in trade in this country as dental rubber. Exhibit A is bought and sold in this country as crude rubber. From reading the description given in scientific books and from persons whom I

have seen who have been in Brazil, they describe the gathering of the India rubber in this way: The tree being cut similarly to a maple tree when you want to get maple sugar, they then either make a basin at the foot of the tree or have some receptacle into which the milk of the tree runs. The collectors of gum—the Indians and others—take a stick and around the end of the stick they make a clay ball. This clay ball is dipped into this milk, which adheres to it, and each layer or every other layer is passes over the smoke made by
27 burning the nuts which grow on that very tree. That is for the purpose of preserving and preventing fermentation, and they keep dipping it until it obtains a certain thickness. It forms then a ball around the end of the stick. When they have it thick enough they cut that open, take out the clay and press it together, and that is the form in which it arrives here. It looks like a ham and smells like a ham. That is the merchantable rubber—crude rubber. The odor of smoke is that which is gained from the smoke of the nuts as the milk is dried. Crude rubber is used for rubber shoes, clothing, hose, garden hose, and door mats, thousands of surgical and other articles. Then hard rubber, in which I am specially engaged, is used for combs and buttons, photographic articles, and thousands of things; for electrical purposes, made in large sheets, and cells at the present moment for accumulator companies, &c. It is very much used in the arts.

Being cross-examined by plaintiff's counsel, witness testified:

The articles made from crude rubber which I have mentioned above are manufactured every day. In the great majority of them, before we get the completed article, the rubber goes through various processes, and up to a certain point it goes through precisely the same process as these exhibits (18 and 19). That point is the grinding it up and adding sulphur. There is what we call washing in our establishment. It is done by means of cutting it up in small pieces and passing it through corrugated rollers in our case and producing the washed rubber, of which I believe there was
28 an exhibit here. It is then dried. During this process it loses somewhere—anywhere from fifteen to twenty per cent. Then it is ground and then mixed with the ingredients required, whatever they may be. Sulphur is a necessary ingredient in some form; so that adding sulphur and some coloring matter to Exhibit A we produce the plate, Exhibit 20. It is a partial step in the progress of producing the completed and finished article, the dental plate. The sole use of Exhibits 18 and 19 is to make the dental plates out of.

Being further examined by defendant's counsel, witness testified:

The article represented by Exhibits 18 and 19 is ready for the use of the dentist. Commercially speaking, it is spoiled for other purposes than dental purposes.

Being further cross-examined by plaintiff's counsel, witness testified:

I do not mean to say that Exhibit 18 is spoiled in itself. I mean to say that — is spoiled commercially, because it is in a shape that I could not make combs out of it without a good deal of labor. It is not the shape I should want to take rubber in.

FREDERICK M. SHEPARD, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am the president of the Goodyear Rubber Company; the president also of the Union India Rubber Company and several others; have been engaged in the manufacture and sale of India-rubber goods for thirty years or more. Exhibit A is crude Para rubber of the best quality, bought and sold in commerce in this country
29 under the name of crude rubber. It is used in the manufacture of all rubber goods—clothing, boots and shoes, belting, packing, hose, and hard rubber goods. It can be used in the manufacture of Exhibits 18 and 19; but it is difficult to tell from these what other kinds of crude rubber can be used in them but Para rubber.

Being cross-examined by plaintiff's counsel:

Exhibits 18 and 19 are a preparation of rubber for the manufacture of dental plates.

The testimony on both sides having been closed, paintiff's counsel moves for a direction of a verdict for the plaintiff on the ground that the goods were free, and on the further ground that under section 2513 they were partially manufactured. These motions the court denied, and the plaintiff, by his counsel, duly excepted, and the exception was allowed by the court.

Counsel for the plaintiff then further moved the court to direct a verdict for the plaintiff for the 20 % rate of duty; this motion the court denied, and the plaintiff, by his counsel, duly excepted, and the exception was allowed.

Counsel for the defendant then moved for a direction of a verdict for the defendant; this motion the court granted, and the plaintiff, by his counsel, duly excepted, and the exception was allowed.

A verdict for the defendant was thereupon rendered by the jury in accordance with the direction of the court.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear
30 upon the records of the trial, therefore, upon the prayer of the plaintiff, by his counsel, the said judge has signed the foregoing as and for the bill of exceptions in this case as of the 9th day of January, 1888.

E. HENRY LACOMBE.

Consented to.

CHARLES CURIE, *Pl'ff's Att'y.*
STEPHEN A. WALKER,
U. S. Att'y & Att'y for Def't.

It is hereby ordered that the foregoing bill of exceptions be filed *nunc pro tunc* as of December 1st, 1888.

Dated Feb'y 11th, 1889.

E. HENRY LACOMBE.

(Endorsed:) No. 11087. U. S. circuit court, southern district of New York. Henry Junge *vs.* Edward L. Hedden. Bill of exceptions. Charles Curie, Esq., attorney for plaintiff, 44 Exchange place, N. Y. city. U. S. circuit court. Filed Feb. 11, 1889, *nunc pro tunc* as of Dec. 1, 1889. John A. Shields, clerk.

31 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HENRY JUNGE, Pl'ff in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error. } Bond for Damages and Costs.

Know all men by these presents that we, A. J. Woodruff, 219 West 134th St., N. Y. city, and C. B. Woodruff, 56 Jones —, Jersey City, are held and firmly bound unto the above-named Edward L. Hedden in the sum of two hundred and fifty dollars, to be paid to the said Edward L. Hedden; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Henry Junge has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Henry Junge shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. J. WOODRUFF. [L. S.]
C. B. WOODRUFF. [L. S.]

Sealed and delivered and taken and acknowledged this 24 day of Nov., 1888, before me—

[SEAL.] FRANK D. BURK.

32 UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

A. J. Woodruff and C. B. Woodruff, being duly sworn, depose and say that they are worth the sum of two hundred and fifty dollars over and above all *his* just debts and liabilities.

A. J. WOODRUFF. [L. S.]
C. B. WOODRUFF. [L. S.]

Sworn to this twenty-fourth day of November, A. D. 1888, before me—

[SEAL.] FRANK D. BURK,
Notary Public, City & County N. Y., #100.

[Endorsed:] 11087. U. S. circuit court, southern district of New York. Henry Junge *vs.* Edward L. Hedden. Bond for costs on writ of error. Chas. Curie, Esq., att'y for pl'ff in error, 44 Exchange place, N. Y. city. Approved as to form, amount, and sufficiency of sureties. E. Henry Lacombe. U. S. circuit court. Filed Dec. 4, 1888. John A. Shields, clerk.

33 Supreme Court of the United States.

HENRY JUNGE, Plaintiff in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiff in error, by Charles Curie, Esq., his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which (*they*) has lost by occasion of said judgment, &c.

CHARLES CURIE,
Att'y for Plaintiff in Error.

34 [Endorsed:] No. 11087. United States Supreme Court. Henry Jung, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Assignment of error. Charles Curie, Esq., 44 Exchange place, N. Y. city, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this fifth day of December, 1888. A copy of the within paper has been this day receiver at this office. Dec. 5, 1888. To Stephen A. Walker, U. S. attorney, attorney for — in error. U. S. circuit court. Filed Dec. 5, 1888. John A. Shields, clerk.

35 Supreme Court of the United States.

HENRY JUNGE, Pl'ff in Error,
vs.
EDWARD L. HEDDEN, Def't in Error. } N. S. 11087. Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, his attorney,

comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error,
F.

36 [Endorsed:] N. S. 11087. United States Supreme Court. Henry Junge, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Joinder in error. Stephen A. Walker, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 5th day of Dec., 1888. Charles Curie, attorney for plaintiff in error. To Charles Curie, attorney for plaintiff in error. U. S. circuit court. Filed Dec. 5, 1888. John A. Shields, clerk.

37 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry Junge is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated December 4, 1888.

E. HENRY LACOMBE.

38 [Endorsed:] No. 11087. U. S. Supreme Court. Henry Junge, plaintiff in error, against Edward L. Hedden, defendant in error. Citation. Charles Curie, Esq., 44 Exchange place, N. Y. city, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 5th day of December, 1888. A copy of the within paper has been this day received at this office. Dec. 5, 1888. Stephen A. Walker, U. S. attorney, attorney for defendant in error. U. S. circuit court. Filed Dec. 5, 1888. John A. Shields, clerk.

Endorsed on cover: Case No. 13,568. S. New York C. C. U. S. No. 368. Henry Junge, plaintiff in error, *vs.* Edward L. Hedden, late collector of the port of New York. Filed June 8, 1889.

Office Supreme Court U. S.
FILED.
OCT 8 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

HENRY JUNGE

vs.

EWARD L. HEDDEN.

No. ~~366~~ 44.

PLAINTIFF'S BRIEF.

EDWIN B. SMITH,
~~STEPHEN G. CLARKE,~~
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

HENRY JUNGE

vs.

EDWARD L. HEDDEN.

No. ~~368.~~ 44.

BRIEF FOR PLAINTIFF.

Statement.

There having been a verdict directed for the defendant in this case, it becomes necessary to state the evidence fully, to ascertain if that direction was justified thereby.

Plaintiff introduced evidence tending to show that during the year 1885 he made entry with the defendant, as Collector of Customs of the Port of New York, of certain rubber, on which the defendant assessed and plaintiff paid a duty of twenty-five per cent. *ad valorem;* that in respect to this assessment in question plaintiff protested, appealed and brought suit, the substance of the protests being as follows:

"Upon certain 'india-rubber' in sheets, claiming said goods to be entitled to free entry under the provisions in the free list for 'india-rubber crude,' Act March 3d, 1883; or, second, if deemed not crude, it is

nevertheless not a manufactured 'article of rubber' in the meaning of the law, but is entitled to free entry under the proviso of Sec. 2499 of said act as crude; or third, at no more than 20 per cent. *ad val.*, as a partially manufactured, non-enumerated article, under Sec. 2513, Act March 3, 1883, see Sec. 23d, Act March 2, 1861, as to rubber in sheets, and not at 25 per cent. *ad val.* as charged by you."

Plaintiff also produced in evidence samples of the rubber in question, marked "Exhibits 18 and 19."

The plaintiff, having been duly sworn, then testified in his own behalf as follows:

The crude rubber in this state has been merely cleaned and subjected to a rolling mill, and in this instance (referring to Exhibit 19) sulphur and a coloring material incorporated, and in 18 merely the crude Para rubber and sulphur mixed together and then put into this shape that is represented here. On the back of the sheet is bookbinder's cloth merely for the purpose of keeping those individual leaves from sticking together and is thrown away after the rubber has been used by the dentist. We sell the rubber exclusively to dental depots and dentists; nobody else can use it but those. (Producing a specimen). This represents the finished plate after it has gone through sundry preliminary processes. The impression of the patient's mouth is taken in plaster of paris, and afterwards from the mould this is started and subjected to vulcanization, and the result is this plate—either of these. This is the regular article as finished by the dentist.

(The five specimens produced by the witness and marked in evidence Exhibit 20).

Those plates are vulcanized.

Being cross-examined by defendant's counsel, witness testified:

I am an importer of these goods. I also import combs and stationer's articles, pen-holders, &c., telegraphic supplies, telephone handles and match-safes.

Q. Do you import crude rubber?

A. Yes; I do, too.

Q. Also crude rubber?
A. Yes.
Q. Have you a sample of crude rubber with you?
A. Yes; here it is.

(Sample of crude rubber marked in evidence Exhibit 21).

I have been brought up in our factory in Hamburg. Dental rubber is made in this country by somebody; some of it, not all. It is not made by any other house in Germany that I know of. There may be one or two, but they do not export any rubber here, I do not think. This is a special brand, which partly is a secret—the manufacture of dental rubber. Maybe somebody else knows the secret of manufacturing, but I do not think so; I never knew of anybody else knowing it. I know a man manufactures a pink rubber, but that does not come under the denomination of what we have imported. Here is the crude rubber, which is put into a mill, and the sulphur and the coloring material added, and simply rolled out into sheets, and this is the result. The crude rubber is put into what we call technically a grinder, and the sulphur and the coloring material added, the mill itself has a heat, but it does not vulcanize. It is not a vulcanizing heat; it is not sufficient to reduce the rubber to a liquid state, but it gets elastic. The process from the crude state right through till it is finished, in the state in which it is here, takes, perhaps, an hour and a half. It all depends on the batch. In this instance the coloring material is worth about the fourth part of the rubber. There is nothing more put in except the sulphur. The proportion of the value of the sulphur is a secret I do not propose to give to anybody. The component materials of No. 18 are rubber and sulphur, nothing else. The value of the crude rubber in No. 19, as it appears by the invoices in the foreign market, is about sixty cents a pound; No. 18 is about the same. It is only the approximate price of sixty cents. I do not mean to say the exact price; only approximate. The foreign value is about sixty cents. No. 18 is worth sixty cents and No. 19 is worth fifty-eight cents. The rubber is worth more without the coloring matter than it is with it, because the coloring material does not cost as much as the crude

rubber. As to bulk the rubber is predominant over the other ingredients in Exhibit 18 and 19 naturally. I know how to make a plate from its crude state to its perfection. I have made plates.

Being further examined by counsel for plaintiff, witness testified:

The articles manufactured of rubber imported into this country, to my knowledge, are combs, telephone handles, knobs, key-knobs, door-knobs, match-safes, and a dozen other, which I import myself.

EDWARD MCCORMICK, a witness on behalf of the plaintiff, being duly sworn, testified in substance as follows:

I am a manufacturer of rubber or working at rubber. I am familiar with samples 18 and 19. We take the crude material and put it through rolling machines or grinders, as we call them. We make some here and grind the material with it. This is the way it is left until it is really manufactured for use, which would be in this state. It cannot be used for any other purpose. It is of no use whatever in its present state. It could not be used for anything, except to manufacture plates like Exhibit 2). It is worthless for any purpose only to make the plates of.

(The witness produces plates.)

These are similar to the others. The only difference is in the colors; some are lighter shaded and some darker; some that are even black. I manufacture them for dentists' use. The process is this: The impressions are taken of the mouth in plaster of paris; the rubber is then simply laid on; then they are subjected to a heat of at least 320 degrees for fifty minutes or fifty five minutes, until they are finished in this state. After the teeth have been set in the plaster, then they come out in that state (indicating). Then they have a buffing machine that they polish them off with, so as to give them a nice color. This is the sole use and object of that material (Exhibits 18 and 19).

Plaintiff then rests.

CHARLES A. SYKES, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am an importer of dental goods of all kinds at No. 30 East Fourteenth Street, N. Y.; have been in that business about fifteen years. The head house is in London. They have branches throughout Europe, and they have a branch here. The house is Claudius Ash & Sons. We deal very largely in dental goods. Am familiar with the names under which various dental goods are bought and sold. Exhibit 18 is what is generally understood by the name "dental rubber," and the same with respect to 19. It does not matter what the color is, or whether there is no color in it all, it is all termed dental rubber, and I import it under that name. We buy crude rubber, from which we manufacture this to the state of either of these samples (Exhibits 18 and 19).

(Witness shown piece of material.) This is crude rubber, bought and sold under that name in trade and commerce.

The piece of material is marked in evidence, Exhibit A.

I have never manufactured dental rubber myself, or assisted in the manufacture, although I have seen some made. The crude rubber is placed in what we call a masticator; this is the name we have; it is just the same as a grinding machine, and the rubber is torn up and shredded until it is got into a state of pulp and the color is added and the sulphur, and when it comes out from that process it is rolled into sheets and brought into this state; then boxed and exported. The length of time it takes to change the crude rubber into the dental rubber depends upon the bulk of rubber that is being done—the weight of rubber that is being put through the masticator; but the whole process could be gone through in half an hour—that is, until it is properly masticated and cleansed and the coloring added; then it would have to be pressed into shape and put into rolling mills to get into these shapes, and cut. To put a batch through all the machinery would take from an hour and a half to two hours; then it would be ready to have this backing put on, which is

put on by girls—just this linen backing—to prevent its sticking together. It would be ready for that process. This can be done almost as quick as you could turn over the pages of a book.

When I speak of dental rubber I mean rubber for dental purposes, and when applied to this particular sort it means rubber to make plates out of for dentists' use.

Being further examined by counsel for defendant, witness testified:

I would not think of giving any one either Exhibit 17 or 18 for crude rubber. It would be impossible to make a dental plate such as this (indicating) from crude rubber. It is not possible to vulcanize crude rubber without the addition of some other substance.

Being cross-examined by counsel for plaintiff, witness testified:

The reason why you cannot make a dental plate from crude rubber like sample A directly is that it would require the addition of some sulphur. The sulphur being added, there would be no difficulty in vulcanizing. If you wanted it colored you would have to add the coloring.

Witness was then asked by counsel for the defendant to state to the jury the market value per pound of rubber represented by Exhibit A in this market in the early part of 1883. To this question plaintiff's counsel objected. The Court overruled the objection, and counsel for the plaintiff excepted and the exception was duly allowed.

I know what the market rates are for dental rubber, because I know what had been purchased and I knew the prices. These prices were all listed. I knew what the prices of these articles were at the time; but with respect to crude rubber, I did not buy any crude rubber. The value of dental rubber in 1883 was a dollar and a half a pound.

Being cross-examined by plaintiff's counsel, witness testified:

The price of the dental rubber was a dollar and a half a pound in this market in 1883, and in Europe it was about the same price. I bought it in Germany, in France and England. The value has not decreased in the European market. It was not as low as fifty-five or sixty cents a pound in the European market in 1885. Personally I have never bought any rubber like samples 18 and 19. I know that it has never been sold in European markets for sixty cents a pound. If a man offered it to me at sixty cents I should know that he has come by it through improper means. I never bought any at that price or at any other price. I did not buy personally myself, but the house that I represent in this country bought it, and they are large dealers in it, and I should know of my own knowledge whether that was worth sixty cents or whether it was worth more or less. The house that I represent has the reputation of being the largest house in the world, having branches in Liverpool, Manchester, Paris, Berlin, Vienna, Hamburg, Copenhagen and St. Petersburg.

Eugene Doherty, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

Exhibits 18 and 19 are bought and sold in trade and commerce as dental rubber. Exhibit A is bought and sold in trade and commerce as crude rubber, or Para rubber. Exhibits 18 and 19 are never bought and sold in commerce as crude rubber. Crude rubber is used to make shoes, boots, coats, hose, belting, rubber combs, and thousands of articles. Exhibits 18 and 19 are used exclusively for dental purposes. Nothing else is done to it before it is used by the dentist, that I know of.

Witness was then asked if commercially any further manipulation of it before it reached the dentist would or would not spoil it for the dentist's purposes. Counsel for plaintiff objected to the question. The Court overruled the objection and plaintiff's counsel excepted, and the exception was duly allowed.

I believe it would spoil it for dental purposes.

Witness was then asked if, in the state in which the dental rubber now is, it is or is not spoiled for any other purpose, commercially speaking. Counsel for plaintiff objected to the question. The Court overruled the objection and plaintiff's counsel excepted, and the exception was duly allowed.

Witness then said it was spoiled for any other purpose.

I will take Exhibit A and describe the process of manufacture from the beginning. We take this and soak it in water for one week or three or four days, then we cut it with a circular saw without any teeth in it, running probably two thousand revolutions a minute. After it is cut it is passed through a washing machine. That is washed (showing a piece of rubber). It is seasoned for a month or three months if we can have it.

The specimen of washed rubber produced by the witness is marked Exhibit B.

Then it is taken and broken in that way. We call it breaking; worked on a machine of this kind (showing a picture of a machine); worked there for an hour or more, and then, after that is done, we put in the sulphur and vermilion—anything you choose; sulphur and vermilion are generally used—and it is mixed in that way (showing sample) with this same machine. It is of no use unless we put sulphur in it. Sulphur and vermilion is the principal compound. Then, after we get through with that, we roll it on another machine, and then it is rolled up and cut in sheets, put in a box of this kind, and done up in this way in muslin (showing sample). That is what we call "manufactured dental rubber" for that purpose. Now it is fit for the market. That is the whole thing in a nutshell. That is it, manufactured and ready for the market; put up in boxes.

Being cross-examined by plaintiff's counsel, witness testified:

Exhibit 20 is the plates. Exhibits 18 and 19 are not raw material; they are manufactured articles. Exhibit A is the raw material. If a man orders raw rubber, I would sell him Exhibit A. If he wants dental rubber, I would sell him dental rubber. I am a manufacturer of the article, Exhibits 18 and 19. Those plates are made from dental rubber. Exhibit B is partly manufactured. We sell it as partly manufactured—washed. If you were going to buy any you would ask for washed, seasoned rubber. It is soaked in water for about a week, and then cut with a saw; that has been probably seasoned for going on two months. Exhibit A has been cut with a knife. It is supposed to flow out of the trees in just that shape, and the natives gather it up. It comes in large cakes; large and small; various kinds. Some weigh fifty pounds, some five, some one. I have seem them count up as high as seventy pounds in a cake, just as they happen to flow from the tree. It runs out in layers as it runs from the tree, as I understand it. I never saw it run.

Being further examined by counsel for defendant, witness testified:

The plates here are made from such material as Exhibits 18 and 19 by the dentist in his private office.

F. C. Armstead, a witness on behalf of the defendant, being sworn, testified in substance as follows:

Exhibits 18 and 19 are bought and sold in trade in this country as dental rubber. Exhibit A is bought and sold in this country as crude rubber.

A. D. Schlesinger, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am an importer of india-rubber goods, and have been in the business nearly forty years. Exhibits 18 and 19 are bought and sold in trade in this country as dental rubber. Exhibit A is bought and sold in this country as crude rubber. From reading the description given in scientific books and from persons whom I have seen who have been in Brazil, they describe the

gathering of the india-rubber in this way: The tree being cut similarly to a maple tree when you want to get maple sugar, they then either make a basin at the foot of the tree or have some receptacle into which the milk of the tree runs. The collectors of gum—the Indians and others—take a stick, and around the end of the stick they make a clay ball. This clay ball is dipped into this milk, which adheres to it, and each layer, or every other layer, is passed over the smoke made by burning the nuts which grow on that very tree. That is for the purpose of preserving and preventing fermentation, and they keep dipping it until it obtains a certain thickness. It forms then a ball around the end of the stick. When they have it thick enough they cut that open, take out the clay and press it together, and that is the form in which it arrives here. It looks like a ham and smells like a ham. That is the merchantable rubber—crude rubber. The odor of smoke is that which is gained from the smoke of the nuts as the milk is dried. Crude rubber is used for rubber shoes, clothing, hose, garden hose and door mats, thousands of surgical and other articles. Then hard rubber, in which I am specially engaged, is used for combs and buttons, photographic articles, and thousands of things; for electrical purposes, made in large sheets, and sells at the present moment for accumulator companies, &c. It is very much used in the arts.

Being cross-examined by plaintiff's counsel, witness testified:

The articles made from crude rubber which I have mentioned above are manufactured every day. In the great majority of them, before we get the completed article, the rubber goes through various processes, and up to a certain point it goes through precisely the same process as these exhibits (18 and 19). That point is the grinding it up and adding sulphur. There is what we call washing in our establishment. It is done by means of cutting it up in small pieces and passing it through corrugated rollers in our case and producing the washed rubber, of which, I believe, there was an exhibit here. It is then dried. During this process it

loses somewhere—anywhere from fifteen to twenty per cent. Then it is ground and then mixed with the ingredients required, whatever they may be. Sulphur is a necessary ingredient in some form; so that adding sulphur and some coloring matter to Exhibit A we produce the plate, Exhibit 20. It is a partial step in the progress of producing the completed and finished article, the dental plate. The sole use of Exhibits 18 and 19 is to make the dental plates out of.

Being further examined by defendant's counsel, witness testified:

The article represented by Exhibits 18 and 19 is ready for the use of the dentist. Commercially speaking it is spoiled for other purposes than dental purposes.

Being further cross-examined by plaintiff's counsel, witness testified:

I do not mean to say that Exhibit 18 is spoiled in itself. I mean to say that it is spoiled commercially, because it is in a shape that I could not make combs out of it without a good deal of labor. It is not the shape I should want to take rubber in.

FREDERICK M. SHEPPARD, a witness on behalf of the defendant, being duly sworn, testified in substance as follows:

I am president of the Goodyear Rubber Company; the president also of the Union India Rubber Company and several others; have been engaged in the manufacture and sale of india-rubber goods for thirty years or more. Exhibit A is crude Para rubber of the best quality, bought and sold in commerce in this country under the name of crude rubber. It is used in the manufacture of all rubber goods, clothing, boots and shoes, belting, packing, hose, and hard-rubber goods. It can be used in the manufacture of Exhibits 18 and 19; but it is difficult to tell from these what other kinds of crude rubber can be used in them but Para rubber.

Being cross-examined by plaintiff's counsel:

Exhibits 18 and 19 are a preparation of rubber for the manufacture of dental plates.

The testimony on both sides having been closed, plaintiff's counsel moves for a direction of a verdict for the plaintiff on the ground that the goods were free, and on the further ground that under Section 2513 they were partially manufactured. These motions the Court denied, and the plaintiff, by his counsel, duly excepted, and the exception was allowed by the Court.

Counsel for the plaintiff then further moved the Court to direct a verdict for the plaintiff for the 20 per cent. rate of duty; this motion the Court denied, and the plaintiff, by his counsel, duly excepted, and the exception was allowed.

Counsel for the defendant then moved for a direction of a verdict for the defendant; this motion the Court granted, and the plaintiff, by his counsel, duly excepted, and the exception was allowed.

A verdict for the defendant was thereupon rendered by the jury in accordance with the direction of the Court."

Statutes.

To our importations the defendant-collector applied this provision of the Act of 1883.

"Articles composed of india-rubber, not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*." (22 Stats. 513, near top.)

The plaintiff's contention was that his importations were dutiable under the same act as "india-rubber, crude," etc. (*Id.*, 519, *h. t.*); or, if not, then under

Sec. 2513. There shall be levied, collected and paid on the importation of all raw or unmanufactured articles not herein enumerated or provided for, a duty of ten per centum *ad valorem*; and all articles manufactured, in whole or in part, not herein enumerated

or provided for, a duty of twenty per centum *ad valorem*. (*Id.*, 523.)

The reference, in the protest, to the Act of 1861, is to this line of Section 23 :

"India-rubber, in bottles, slabs or sheets, unmanufactured." (12 Stats. 195.)

Assignment of Errors.

The plaintiff assigns for error :

I. The refusal of the Judge to direct a verdict for the plaintiff, as by him requested. (Rec. 15 near bottom.)

II. The granting of defendant's motion for the direction of a verdict in his favor, and the directing of a verdict in defendant's favor. *(Ib.)*

III. The judgment for the defendant entered upon the verdict rendered, by direction of the Court, in favor of the defendant. (Rec. 7.)

POINTS.

The question presented is whether the Court below, upon the evidence, ought not to have directed a verdict for the plaintiff, instead of directing one for the defendant, as it did. (Recs. 7 and 15, fol. 29.)

If the Tariff Act of 1883 contains any special designation of our importation, it is "india-rubber, crude;"—if any enumeration of it by a descriptive clause (Barber vs. Schell, 107 U. S. 621, near top), it is found in Sec. 2513, as an article manufactured in whole or in part. Supplementing the specifications and descriptions of preceding paragraphs, the two clauses of Section 2513 would seem to

exhaust the whole realm of nature and the domain of art—but, if aught can escape the sweep-net of this section, it must be caught up in the meshes of Section 2499. Our impression is that the second provision of Section 2513 covers this dental rubber, yet our protest is, if such be not the case, Section 2499 must determine the duty.

Certainly the clause applied by the Collector is inapplicable, as we will first proceed to show.

"India-rubber crude" cannot *directly* apply to these goods (though it may by similitude) unless the idea of *absolute* crudity is modified by association with "milk of" rubber, which is, *ex necessitate rei*, not the juice or sap as it flows from the tree, but as held in suspension by ammonia.

I.

The *prima facie* presumption in favor of the collectector's assessment is easily overcome by an examination of the phraseology of this statute, comparing it with that employed in other tariffs, and with those facts so generally known as to be of judicial cognizance.

It will be perceived that there has always been a distinction maintained as to the condition of the rubber itself, whether crude or otherwise; between "boots and shoes" (and other specified things) and unspecified "*articles* composed of india-rubber" and "india-rubber *fabrics*"; this marked difference between the last two being perpetuated—that the "articles" must be composed wholly of rubber, while the "fabrics" might be only in part of that material. (22 Stats., 513; Heyl, A. D. 1884, Paragraphs 453, 454, 455 and 724.)

Arthur vs. Davies, 96 U. S. 136.
Beard vs. Nichols, 120 *Id.* 263 bot.

It may be well to give a chronological summary of the development of the uses and manipulation of rubber that the circumstances existing at the date of each tariff may be recalled in connection therewith.

Little more than one hundred and fifty years ago attention was first called to the useful nature of this substance by the French astronomers who observed it in Peru; but, as its name indicates, it was only or chiefly as an eraser (or "rubber") that it was for many years employed. Dr. Priestley, in 1770, mentions it being recently called to his notice "as admirably suited to rubbing out pencil-marks, and as being then sold at the rate of three shillings sterling for a cubical bit of about half an inch. It was afterward applied to the preparation of varnishes. The chemist soon found how well adapted it was to connect with flexible joints the glass tubes required for their operations," etc. "It came then to be used to render cloths water-proof," etc. IV. Am. Cy. (old ed.) 388–9, Tit. Caoutchouc. It was in 1823 that Macintosh discovered and patented this use of the gum, the garments made by him being designated by his name. (*Ib.*)

"In 1825, Thomas C. Wales, a merchant of Boston, introduced the original Para overshoe in the rough," etc. 3 Am. Cy. (last ed.) 736.

"In 1826 and 1827 Messrs. Rattier & Guibal of St. Denis, near Paris, employed machinery for cutting filaments of india-rubber of which they made *fabrics*" (*Ibid.*)

In 1834, Edwin M. Chaffee, of Boston secured a United States Patent for india-rubber hose. (*Id.* 737.)

Charles Goodyear's investigations commenced in 1834; he first using nitric acid, but in 1839 he saw Nat. Hayward sprinkling sulphur upon rubber, and procured an assignment to himself of Hayward's Patent of 1838 and devoted himself to its improvement, taking out his own first vulcanizing patent June 15, 1844. To this,

other patents, altogether "too numerous to mention," succeeded.

Goodyear vs. Day, 2 Wall. Jr. 284 et seq.

Now let us turn to the statutes affecting this material, which we should hardly expect to find specifically mentioned prior to the inauguration of Mr. Wales' enterprise in 1825.

"The import of india-rubber, in any form, into this country, does not appear to have attracted attention in the revenue laws, as a separate and specific article, till 1832."

Lawrence vs. Allen, 7 How. *792.

The third section, tariff of July 14, that year, exempted it from duty entirely, whether crude or not (4 Stats., 590).

Same in Act, Mch. 2, 1833, §5. (*Id.* 630).
Also that of Sept. 11, 1841, §1. (5 Stats. 463).

In 1833 Mr. Chaffee and his associates procured a charter as the Roxbury India Rubber Company, "the first company organized in the United States to manufacture waterproof clothing." Considerable excitement ensued, and other similar corporations sprung up in Massachusetts and New York; but the sailors preferred their oil-skins because of the stickiness of the new garments. 3 Am. Ency., last ed., 737. Such continued to be the fact long within present memory, and until the vulcanized rubber came into general use.

Of course, the makers of these "mackintoshes" desired to have their raw rubber free, and had it, from that day to December 1, 1846; and again by the Act of 1883.

As noted above, the only things brought in or made here prior to the date of the Act of August 30, 1842, were garments or commodities of rubber in the natural state or combined into some water-proofing material;

vulcanization and other such processes were unknown.

That act (5 Stats., 555, top) put 35% upon all braces of whatever material, except india-rubber; and upon "india-rubber, oil-cloth, shoes, braces or suspenders, or other *fabrics* or manufactured *articles* wholly or in part of india-rubber, 30% *ad valorem*, provided those costing less than $2 per dozen should be valued at $2 (*Ibid*, "Tenth.")

The Act of August 30, 1846, specifies "shoes composed *wholly* of india-rubber," at 30%, in Schedule C; and places in Schedule G at 10 per cent., "india-rubber, in bottles, slabs or sheets, unmanufactured" (9 Stats., 45 and 48.)

The Act of March 3, 1857, put a uniform rate of 24% upon all articles enumerated in Schedule C, but transferred to Schedule H "india-rubber in bottles," &c., dutying at 5%, and there first added "india-rubber, milk of" (11 Stats., 192-3) and slipper patterns "*not* combined with india-rubber." (*Ib.*) It further provided that all articles not enumerated in one or the other of the several schedules should pay 15 per centum. (*Id.*, 192, bottom.)

The Act of 1842 places the same rate upon "fabrics or manufactured articles," whether wholly or in part of rubber; that the terms were not employed synonymously can be seen from their general use, and that in the Act of 1861 they bear different rates of duty, rates imposed by separate provisions, and have ever since.

The twentieth section of this Act of 1861 affixes 20% to "Shoes or boots, and other *articles*, composed *wholly* of india-rubber," n. o. p.; and Sec. 22 puts 30% upon "Braces, suspenders, webbing or other *fabrics*, composed wholly or in *part* of india-rubber," n. o. p. (12 Stats. 190, 191.) The free list, Sec. 23, exempts "india-rubber in bottles," etc., and "milk of." (*Id.* 195.)

The Act of August 5, 1861, § 2, imposes ten per cent. upon "India-rubber, raw or unmanufactured; on india-rubber shoes and boots, 30% *ad valorem*." (*Id.* 293.)

The Act of July 14, 1862, § 8, placed 50 per cent. upon manufactures combining *silk* with india-rubber, or with that *and* other materials. (*Id.* 552.) Section 13 added 5 per cent. to the existing rate upon "Braces, suspenders, webbings or other *fabrics*, composed wholly or in *part* of india-rubber," n. o. p. (*Id.* 556.) It also made the same addition to manufactures of mixed materials, if composed of the textiles there specified (of which rubber was not one.) (*Id.* 557.) This is merely mentioned as one of innumerable instances of duties specifically imposed upon a combination, differing from those borne by the several constituents.

The Tariff of June 6, 1872, § 2, gave the horizontal 10 per cent. reduction of duty to all "manufactures of india-rubber, gutta-percha, or straw," etc. (17 Stats. 232.)

Thus were the laws which were reproduced in the Revised Statutes.

The Act of March 3, 1883, in force when our importations were entered, duties manufactures of rubber in this wise:

"India-rubber *fabrics*, composed wholly or in *part* of india-rubber, not specially enumerated or provided for in this act, thirty per centum *ad valorem*.

Articles composed of india-rubber, not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*.

India-rubber boots and shoes, twenty-five per centum *ad valorem*." (22 Stats. 513).

"India-rubber, crude, and milk of;" free (*Id.*, 519.)

Upon this phraseology, we wish to recur to these observations; (1.) There is a discrimination between the raw rubber crude, which is free, and the raw rubber purified, which is dutiable as unmanufactured (although *there is no specific designation of it*) unless it is free by assimilation; (2.) There is a discrimination between *fabrics* and *articles* of rubber, boots and shoes being specially withdrawn from the descriptive clause;

(3.) There is a discrimination between *articles wholly* of rubber, and those *partly* of that material.

(1.) The distinction between the crude and refined substance is frequently made, in every tariff. Schedule A of this Act of 1883 puts two cents a pound upon glycerine, crude, etc., and four cents if refined. (22 Stats. 492 top.) In the free list, we find "Argal, or argol, or crude tartar" (*Id.* 515), while four cents a pound is laid upon "tartars partly refined." (*Id.* 492.)

Recknagel vs. Murphy, 102 U. S. 197.

"Gutta-percha, crude:" is free (*Id.* 519.) "Gutta-percha, manufactured," is dutiable (*Id.* 512), as we shall presently again observe, in another connection.

These examples, which might be multiplied an hundredfold, are introduced as preliminary to this further observation; that many instances (*of which "india-rubber, crude," is one*) could be cited of the specification of the crude substance, as free or dutiable, with *no mention of it when refined.* One, taken from near the head of the free list, will suffice; "Bones, crude, not manufactured, burned, calcined, ground or steamed" (*Id.* 515, top.) Schedule N enumerates manufactures of bone, horn, etc. (*Id.* 511) but there is no enumeration of the manufactured bone. So, of "horns and parts of horns, unmanufactured," etc. (*Id.* 515 and 511.)

(2.) There is a distinction created or recognized between partially-india-rubber 'fabrics' and those 'articles' of which it is the sole component.

This obvious discrimination oversets the whole course of reasoning in the oral remarks with which the Judge accompanied his direction.

Junge vs. Hedden, 37 Fed. Rep. 198.

That the word 'articles' *might* be employed to include alike those of a specified substance, manufactured

or unmanufactured, may be true (as, in § 2500, it includes everything capable of being imported); but such extended, comprehensive meaning, *in the present connection*, is negatived by the immediately precedent use of the word 'fabrics,' which might otherwise be lexicographically included therein.

Neither is it at all pertinent to the construction of *this* paragraph that, in other parts of the statute, *the context* requires or indicates the comprehensive meaning.

U. S. vs. Fisher, 2 Cr.* 387.
McIntyre vs. Ingraham, 35 Miss. 52.

The learned Judge mistook the word and meaning, in his illustration taken from Heyl, Par. 441, "Gutta-percha," etc. (22 Stats. 512.)

As above noticed, the act admits crude gutta-percha free, and duties "gutta-percha *manufactured*, and articles of"—not *manufactures* and articles, as he misread it. (37 F. R., 198.)

It is said, of this substance;—

> The sap soon coagulates after it is collected, or it is made to do so by boiling, and is then kneaded by hand into oblong masses, seven to twelve inches long and four or five broad. Its dark reddish-brown color is derived from the impurities, as bits of the bark, that have accidentally fallen into the juice, or from sawdust and other substances introduced as adulterants. The gum may be obtained pure by dissolving the crude article in sulphuret of carbon or oil of turpentine, straining and evaporating. It is then of a grayish-white color," etc., etc.

VIII Am. Cy. (old ed.), 597.
Goodyear vs. Berry, 2 Bond, 201 *bottom*.

As gathered, it is crude; it is purified by being thus "manufactured."

The very paragraph the Judge quotes emphasizes our distinction, as we apply it to india-rubber, between the

"crude" gum, the gum "manufactured" (but still gutta-percha) and "*articles*" made of that substance.

Had "gutta-percha, manufactured," not been enumerated, still the purified gum would neither have been "gutta-percha, crude," nor an "article of gutta-percha," but the purified material.

So, if our india-rubber, by its manipulation, ceased to be 'crude,' but "is still *rubber*" (as the Judge thought—37 F. R. 198 bottom) it is not *an* "article of india-rubber," but *the* article, rubber, purified, and non-enumerated by *special* designation.

As in multitudinous other instances, the tariff distinguishes between the raw material crude and not crude.

In the other judicially-cited paragraph referred to, it is obvious that the words "manufactures and articles" of leather, etc., are intended synonymously. (38 F. R. 198; 22 Sts. 513 middle.) It *could not* be meant to include the article, leather, itself; for all "leather, not *specially* enumerated," etc., had been provided for but a few lines above. (22 Stats., 513.)

Such tautological, synonymous use of words is frequent.

Arthur vs. Cumming, 91 U. S. 364–5.

Where lexicographers and common speech affix several meanings to any word, that one must be adopted, in the construction of a statute or contract, which best accords with the context and with its ordinary use with relation to that subject-matter.

Webster defines "fabric" as "manufactured cloth," etc. The "International Dictionary" repeats this definition, thus elaborating it;—

"Fabric * * * cloth of any kind *that is woven* or knit from fibers, either vegetable or animal; manufactured cloth, as silk and other fabrics."

The associated words ("braces, suspenders, webbings and *other* fabrics") limits the generality of the applica-

tion to *woven* fabrics, as the course of legislation so limited the word "animals," as not to include "singing birds;" or "dried fruits" to include "almonds," etc., etc.

Reiche vs. Smythe, 13 Wall. 163.
Homer vs. Collector, 1 *Id.* 86.
Arthur vs. Lahey, 96 U. S. 116–7.

While all fabrics and all manufactures may be '*articles*,' some articles are neither, and many manufactures are not fabrics.

Movius vs. Arthur, 95 U. S. 147.
Barber vs. Schell, 107 *Id.* 621.
Goodyear vs. Cary, 4 Blatc. 273, 276.
Eureka, 4 Sawy. 317.

Nobody has ever suggested that our importations were "fabrics." We did not so import, nor the Government so duty them. But we have elaborated the distinction in order to show that "articles" in the next clause (wrongly applied to our importations) has not the general, comprehensive meaning assigned to it by the Collector and the Court.

The specific designation of "india-rubber boots and shoes" at the same rate as "articles," shows that it was not deemed possible to classify them as 'fabrics,' nor to duty them as 'articles' when not wholly of rubber—which for many years they have seldom been, although they were so originally.

Lawrence vs. Allen, 7 How. *795.

The word 'articles' being subject to *some* contextural limitation of meaning the widest scope possible to be here assigned it must be somewhat more restricted than it has just been shown to bear in the leather schedule—where it is the equivalent of 'manufactures'—because here a 'fabric' of the designated material is subtracted therefrom.

But "manufactures" or "articles" *of* or from a raw material cannot intend, for dutiable purposes, that ma-

terial itself, whatever be its condition of crudity, or its state of prepartion *for* manufacture.

Cotton, as picked or when ginned, cleansed and baled; iron, extracted from the ore, whether in pigs or bars; wool, in the grease, washed or scoured; are all dutiable as the raw material, and not as its manufacture. Those several processes above indicated are steps in the preparation *for* manufacture. A cargo of cotton, iron, wool, or any lesser quantity of either, is not an *article* of either material. It is the thing itself. The whole list of denominations, descriptions and enumerations of the tariff together cry out against construing mere materials as "articles composed of" those materials.

Articles composed of iron, wool, cotton, india-rubber, means something made up out of those substances, like pots, or shawls, or thread, or rubber-shoes, &c. Mere purification does not make the thing any less itself, after extraneous substances have been removed.

Arthur vs. Pastor, 109 U. S. 139.

The preceding paragraphs were written without the fact being at the moment recollected that this Court has used the same illustrations, though the general tenor of its decisions was remembered.

"They were still shells. They had not been manufactured into a new and different *article*, having a distinctive name, character or use from that of a shell. The application of labor to an article does not necessarily make the article a manufactured article, within the meaning of that term as used in the tariff laws. *Washing and scouring wool does not make the resulting wool a manufacture of wool* [nor an article of wool]. *Cleaning and ginning cotton does not make the resulting cotton a manufacture* [nor an article] *of cotton.*"

Hartranft vs. Wiegmann, 121 U. S. 615.

Citing

U. S. vs. Potts, 5 Cr. 284.
Frazee vs. Moffitt, 20 Blatc. 267.
Foppes vs. Magone, 40 F. R. 570.
Keutgen vs. Laurence, 1 Blatc. 615.

This topic of the discussion is here concluded with the observation that it is specially directed toward the assumption of the Court that

"the admixture of sulphur and of coloring matter, to a considerable extent, *has not changed the character of the article, it is still rubber.*" (37 Fed. Rep. 198 bottom.)

Our argument and protest, based upon this view of the subject, is that, if "still rubber," it cannot be a manufacture or article of rubber, either partial or complete, nor "rubber, crude;" but, as rubber *not* crude, it is either (by assimilation to the crude article in material and use) to be admitted free, or to come in as an unmanufactured article, under the *first* clause of Section 2513, as found in the Act of 1883.

That is, if the Judge's assumption of *fact* is correct, he applied the wrong provision of law thereto.

(3.) We now propose to challenge the correctness of the assumption (37 F. R. 198 bottom) that the manipulation and combination of the several constituents left the resulting article "still rubber."

We deem the contrary theory to be that upon which the Goodyear and subsequent allied patents have been sustained in almost every civilized court.

Independent patents, for the process and the product, have both been declared valid, because the *new* process resulted in a *new* and useful article.

Goodyear vs. Wait, 5 Blatch. 470.

It was a new subject of commerce and manufacture.

This is the first claim of Goodyear's reissued patent;—

"What is claimed as the invention of Chas. Goodyear, deceased, is the *new manufacture* called vulcanized rubber, which is *a combination of india-rubber with sulphur* (whether with or without other ingredi-

ents), *chemically altered* by the application of heat, substantially as above described."

Goodyear vs. Prov., 2 Cliff. 359, 373.

Unless we are greatly mistaken, it is but an easy task to show that the cause at bar comes within the *principle* of Meyer vs. Arthur, 91 U. S., 570 (and like cases), rather than the Sussfield case, and those in which the admixture has not *substantially* changed the character of the ingredients.

In the Meyer case, lead had, by the mere application of heat, lost its metallic character. In ours, the same mysterious chemical agent conferred upon the rubber and sulphur a metallic character. (91 U. S., 576–7.)

In his very lucid opinion BRADLEY, J., observes;—

"*Any* substance subjected to a chemical change by uniting with another substance, *loses its identity;* it becomes a different mineral species. * * * They have lost [or acquired] all their metallic qualities. * * * Iron ceases to be iron when it becomes rust," etc. [Yet it is *called* 'iron-rust'; so white-lead, dental rubber, vulcanized rubber, etc.] "In the poverty of language, they have no distinct names * * * but each is designated by a scientific periphrasis in which the name of the metal which forms one of its chemical elements is used."

Meyer vs. Arthur, 91 U. S. 577 top.

The Government's claim (sustained here) in that case was that white lead is a manufacture *from* lead and not a manufacture of lead.

In Mr. Goodyear's suit against Day, tried before GRIER, J., Mr. Webster counseled the plaintiff and Mr. Choate the defendant. This sentence of Mr. W.'s unanswerable argument has the emphasis of italics in the report:

"It introduced quite a *new* material into the manu-

facture of the arts, that material being nothing less than *elastic metal*."

Goodyear vs. Day, 2 Wall. junr., 295.

In further discussing the patent, after noticing that the application of heat produced a melting effect, Mr. Webster remarked :

"Yet when that heat, going on, had got up to a certain much higher degree, its effect was the reverse of what it had been, and then the rubber *composition* commenced to vulcanize and harden ; in fact, *to make metallic the vegetable substance*."

Ib. 289, 294, 299.

"Caoutchouc.—Being impermeable to liquids and gases, and not readily affected by exposure to air, acids, and alkalies, it is used, *especially when vulcanized*, for many purposes in the arts, and *in manufactures*."

(Internat. Dict.)

"India-rubber in the crude state is *prepared for manufacture* by grinding the sheets in water for the purpose of cleansing it. After this, it is dried and subjected to the tearing action of toothed rollers, one of which revolves faster than the other. At this stage the *vulcanizing material*, consisting of a half-ounce of sulphur or more to the pound of rubber, according to the required hardness is added and thoroughly incorporated."

2 Knight's Am. Mech. Dict. 1179, *h. t.*

The record shows the coloring matter to be one-fourth of the value of the rubber, but the precise proportion of sulphur was a trade secret. (Rec. 9, fol. 19.) This secretiveness is not peculiar to the plaintiff.

"Charles Goodyear, in his original patent, preferred five parts sulphur and seven white lead to twenty-five caoutchouc. The particular proportions of these and other articles are however, we believe, generally pre-

served as secrets among rubber manufacturers, each having special formulas of his own."

1 Knight's Am. Mech. Dict., 454.

Austin adopts one-third sulphur, and Goodyear equal parts in 1851. (2 Fish. Pat. Cas., 317–8.)

Goodyear vs. Mullee, 5 Blatc., 463.

Judge GRIER speaks of vulcanized rubber as being as distinctively a new material as steel.

Goodyear vs. R. R., 1 Fish. 632.

Judge NELSON adopts Judge SHIPMAN'S statement, as to the creation of a distinctively new material of *hard* vulcanized rubber, under Nelson Goodyear's Patent, *this being the dental-rubber plates for which plaintiff's importations were made.*

Goodyear vs. N. Y., 2 *Id.* 315.
Same vs. Berry, 3 *Id.* 440, 455.

The Tariff of 1890, paragraphs 460 and 461 (26 Stats. 602), duties manufactures of india-rubber at one rate and those of "vulcanized india-rubber, known as hard rubber," at another.

This distinction long prevailed in art and commerce before it was noticed by Congress, whose legislation merely (often tardily) recognizes commercial distinctions, and does not create them.

It may be said, our importations had not been vulcanized or converted into hard rubber. This is immaterial, since the materials had been so compounded, and the process of manufacture had proceeded so far, that their destiny and use had been irrevocably determined thereby. These sheets of dental rubber could be used for nothing else than plates for teeth (Rec. 10, fol. 20 ; 12, fol. 24.)

One Government witness testified :

"When I speak of 'dental rubber,' I mean rubber for dental purposes; and when applied to this particular sort, it means rubber to make plates out of for dentists' use." (Rec. 11, fol. 22.)

Goodyear vs. Willis, 1 Flip. 401.

In a case often referred to, it was described (both in the Circuit Court and in this Court) as "a vulcanizable compound," which was to be converted into vulcanite, by subjection to heat, after the teeth had been embedded therein.

Smith vs. Goodyear, 93 U. S. 493.
Goodyear vs. Smith, 1 Holmes, 354.

We do not consider it a fact of the slightest importance that the Treasury decisions have sometimes held rubber rolled into sheets to be admissible as crude, and sometimes as partially manufactured. In the present case, the compounding was done solely as steps in the manufacture of a specific article; as the mere "hammering on the horn of the anvil" of steel blooms, "forming a grain or fibre circumferentially," was called "an important stage in the process of manufacture into steel tires."

Tyre vs. Spalding, 116 U. S. 548.
Same case below, 19 F. R. 412-3.

At the bottom of the preceding page, the paragraph commences thus:—

"It being assumed, as it must be on the findings, that these blooms were adapted and intended for tires for car-wheels, and not for driving-wheels, it is clear, we think, that they were partially manufactured tires of that character." (*Ib.* 547.)

In his opinion in the patent suit of Goodyear vs. Gardner, 4 Fish. 230, CLIFFORD, J., observed;—

"Neither party necessarily manufactures the hard rubber of which the plate is composed, and in which

the teeth are set, any more than they do the artificial teeth. Both use artificial teeth, but they take such as they find for sale * * * and they both use hard rubber as they find it combined and prepared, or *partially* prepared," etc. (4 Fish. Pat. Cas. 230).

Dent. V. Co. vs. Wetherbee, 2 Cliff. 565, bot.

We wish to note that it was a generally recognized fact, even then, that the *combination* of india-rubber, sulphur and coloring, "known as hard rubber," was an article of commerce as "*partially* prepared."

What degree of admixture of materials, or change of form, will remove an import from one classification to another can be illustrated by reference to a few adjudications.

The duty upon "loaf-sugar" is inapplicable to crushed sugar, or lumps formed by breaking the loaves, though they have been broken up for the purpose of changing classification.

U. S. vs. Breed, 1 Sumn. 159.
Seeberger vs, Farwell, 139 U. S. 608.

The tariff distinguishes between sugar and the earlier stage of concentrated molasses or melado, because trade discriminates ; and sugar to which merely water had been added was admitted at 15 per cent. as "syrup," instead of paying three and four cents a pound as sugar.

U. S. vs. 112 casks, 8 Pet. 277.

If such be the effect of adding water, the natural or artificial evaporation of which leaves the sugar as before, in its nature and use, *a fortiori* must the addition of a substance to rubber, which cannot be separated therefrom and fixes inalterably its commercial and mechanical destiny, have the same consequence.

We do not assent to the Court's proposition, that the enumeration of "articles of rubber" must not be restricted to those *substantially* of rubber, though an *immaterial* addition of some other substance might be inconsequential.

An article made of rubber and other ingredients cannot be said to be a manufacture of the one component any more than the other; especially (as already noted) where the other substances fundamentally change the character of the rubber, in its essential qualities.

With or without the word 'wholly' india-rubber is as much a designation "of quality *and* material" as is the word 'cotton.'

Barber vs. Schell, 107 U. S. 621.

When Congress does not intend that the import shall be entirely of the specified material, it indicates such intention by use of the words "or of which it is a component," or (as in the clause relating to fabrics of india-rubber) by saying "wholly or in part," or some such equivalent expression.

The word "wholly" is superfluous *except* when used in connection with "or in part."

By the Court's construction, these qualifying words are meaningless in the paragraph relating to fabrics.

We contend that this close antithesis implies that the "articles" mentioned must be made completely of rubber.

II.

Our goods were made either of rubber and sulphur, or of these materials with one-fourth value of coloring matter.

The rubber (as a raw material) is free.

This makes Sec. 2513 (Act of 1883) applicable to our goods upon the precise reasoning of this Court :—

"Quilts are non-enumerated manufactured articles, composed of two or more materials. Eider-down is on the free list. As eider-down is the material of chief value in the quilts involved in this suit, and that is free, it follows that they are manufactured articles not [specifically] provided for, and therefore chargeable with the duty of twenty percentum *ad valorem* under §2513, rather than 25% as a manufacture of cotton," etc.

Hartranft vs. Sheppard, 125 U. S. 338 bot.

Though our goods are but partially manufactured, they pay the same duty of 20 per cent., under the same section.

EDWIN B. SMITH,
~~STEPHEN C. CLARKE,~~
Of Counsel.

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Supreme Court of the United States.

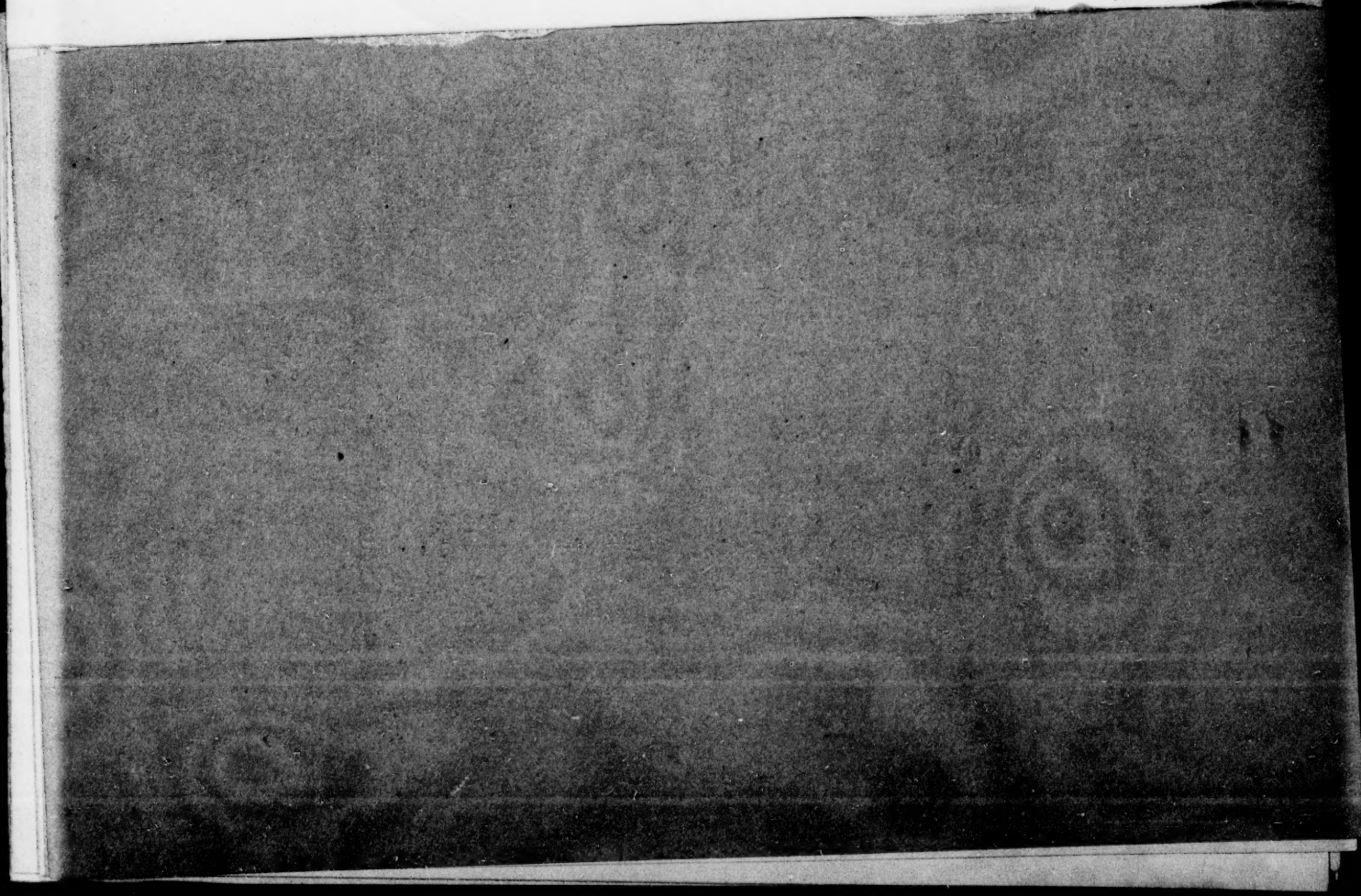
OCTOBER TERM, 1892.

HENRY JUNGE, plaintiff in error,
v.
EDWARD L. HEDDEN. } No. 44.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.



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BRIEF FOR THE DEFENDANT IN ERROR.

This case arises out of some seventeen importations of *dental rubber* into the port of New York by the plaintiff in error during the year 1885.

The collector exacted duty on the merchandise in question at the rate of 25 per centum ad valorem under the provision of Schedule N, of the tariff of 1883 (T. I., par. 454), which lays a tax at that rate on "*articles composed of India rubber, not specially enumerated or provided for in this act.*"

The importer protested against this action of the collector, making three alternative contentions, namely (1) that the merchandise was entitled to free entry under section

2503 of the said act (T. I, par. 724), which admits without tax "*India-rubber, crude, and milk of*," or (2) that, if deemed not crude, it is not a manufactured article of rubber in the meaning of the law, but is entitled to free entry under the proviso of section 2499, of the said act, which declares "That *nonenumerated* articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free," or (3) that the merchandise was dutiable at not more than 20 per centum ad valorem under section 2513 of said act, which lays that rate of duty on "all articles manufactured, in whole or in part, *not herein enumerated or provided for*" (p. 8).

This action is brought to recover back the alleged excessive exaction of 5 per centum.

TRIAL, VERDICT, AND JUDGMENT

The case was tried on January 5 and 9, 1888, before Judge Lacombe, and a verdict rendered for defendant, under the direction of the court, and judgment entered *nunc pro tunc* as of December 1, 1888 (p. 7).

OPINION OF THE COURT.

The opinion of Judge Lacombe, in support of his direction to the jury, is as follows:

> Descriptive terms applied to articles of commerce are, of course, to be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of the act in which they are found. Under the testimony, therefore, these importations are not "crude rubber" or "milk of rubber" enumerated in the free list (paragraph 724), and, in fact, the plaintiff, as I understand him, does not contend that they are. He claims, however, that under the similitude

clause they are to be classified with crude rubber, and should thus pass free of duty. In order to entitle them to the provisions of the similitude clause (section 2499) they must be nonenumerated. Defendant contends that they will be found enumerated in paragraph 454, "Articles composed of india-rubber not specially enumerated or provided for in this act, twenty-five per centum ad valorem." It was at this rate the collector assessed and collected duty. If they are within the provisions of this paragraph, then they are not nonenumerated, and the similitude clause does not apply.

Plaintiff contends that the paragraph last quoted should be restricted to manufactured articles, to materials which are put in such condition that they are ready for final use. The word with which the paragraph is begun is "articles," and this word we find repeatedly used in the statute, if not in contradistinction to, at least not as synonymous with, "manufactures." In the very schedule in which paragraph 454 appears we find paragraph 441, "Gutta-percha manufactured, and all articles of," and in paragraph 463 we find "all manufactures and articles of leather." What, then, does the word "article" mean? Is it to be restricted to manfactures, to articles put in condition for final use, or is it not? The ordinary definition of the word article is an extremely comprehensive one.

In its primary meaning, as given in the dictionaries, it designates one thing of many; one item of several; a portion of a complex whole. The best source, however, to which we should apply to determine the definition of a word used in a statute is the statute itself. It is not to be assumed that the same word is used in the statute with two different meanings, unless that is made clearly apparent by the connection in which the word is used. In section 2500 of the Revised Statutes, which is part of the tariff law, the word "article" is used as comprehending a growth, a product, or a manufacture. Section 2502, which prescribes duties, begins, "There shall be levied, collected, and paid upon all articles imported from foreign countries," and then follows an enumeration, from the crudest raw material to the most finished work of human industry. The free list, section 2503, also begins, "The following articles, when imported, shall be free of duty."

It seems, then, from the act itself, that the word "articles" is used in a broad sense; that it covers equally things manufactured, things unmanufactured, and things partially manufactured. That being so, I find nothing in the context of this paragraph to qualify the meaning which is indicated by its use elsewhere in the act, and am of the opinion, therefore, that the word "articles" at the beginning of the paragraph is sufficiently broad to cover the goods in question if they are composed of India rubber.

It appears that there is an admixture here of sulphur and of coloring-matter, and to a considerable extent; but it has not changed the character of the article. It is still rubber. And in view of the fact that the act of 1883 changed the former paragraph, as it stood in the Revised Statutes, by striking out the word "wholly," between the word "composed" and the words "of rubber," I am of the opinion that the articles in suit are fairly within the enumeration of paragraph 454. Being enumerated, they are not within the operation of the similitude clause. For that reason, I shall direct a verdict for the defendant.

ARGUMENT.

It is hardly necessary to do more in support of the judgment in this case than to refer to the opinion of the learned judge below (*supra* and 37 Fed. Rep., 197) in support of his direction to the jury to find for the defendant.

The labored argument of the learned counsel opposite appears to us to be far outside the limits of any known rule permitting resort to extraneous assistance in the interpretation of statutes. Recourse may, indeed, be had to such assistance for the purpose of understanding what is *already in the statute*, but not for the purpose of importing into the statute something not already there. The object of the other side, however, is, first, *interpolation* and, then, interpretation.

The merchandise in question is india-rubber or, simply, rubber. It also has the trade name of dental rubber. But it is always *rubber* under any of those denominations.

It is not, however, *crude* rubber, for, to accommodate it to dental purposes, it has undergone a slight manipulation. In its crude state it is placed in a machine called a masticator, where it is hackled and ground until reduced to a pulp, when sulphur and coloring matter of some kind, generally vermilion, are added. The next process is to roll the pulpy mass into sheets. It is then cut into pieces of the proper size and backed with linen, to prevent the pieces, when put up for market, from sticking together.

No claim is made that the result of this process is still crude rubber; the most that is claimed is that it should

have come in free, by reason of its supposed similarity, in material, quality, or texture, to crude rubber, which is on the free list, under the concluding *proviso* of section 2499 of the tariff of 1883, commonly called the similitude clause; or, failing that, that it should be dutiable at 20 per cent ad valorem as an article manufactured in whole or in part, and not enumerated or provided for, under the second clause of section 2513.

But the learned judge below rejected those contentions on the ground that to maintain either of them it was necessary to show that the merchandise in question was not enumerated anywhere in the tariff; whereas, the learned judge held, it was there enumerated, being fairly within the terms of paragraph 454, Schedule N, which imposes a duty of 25 per cent ad valorem on "articles composed of india-rubber, not specially enumerated or provided for in this act."

In the face of the fact, referred to by the learned judge below, that the phraseology of the previous tariff, namely, "*articles composed wholly of india-rubber*" (Rev. Stat., p. 477), was changed by the tariff of 1883 by *omitting* the word "*wholly*," the contention is that the provision, *as changed*, must be read as though that word "*wholly*" still held its place there.

The argument is, that because in several previous tariffs the word "*articles*" has not been used in connection with manufactures of india-rubber, except where such manufactures are composed *wholly* of such material, the mere fact of continuing the use of that word "*articles*" in paragraph 454 makes the paragraph read precisely as

though the omitted word "*wholly*" were in the law. If, then, the merchandise in question is a manufacture at all, which the plaintiff in error does not admit, the admixture of sulphur and vermilion, which the merchandise contains, forbids, it is said, its classification as a manufacture composed wholly of india-rubber.

As the learned judge points out, the word "article" is used all through the tariff in the widest sense. For example, the free list begins thus: "SEC. 2503. The following *articles* when imported shall be exempt from duty," and then follows a long enumeration of things, including, par. 649, "articles the *growth*, *produce*, and manufacture of the United States, etc.;" and section 2502 providing that "there shall be levied, collected, and paid upon *all articles* imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty," etc.

Certainly a broader and less discriminating use of the term "*article*" than is furnished by these quotations could hardly be imagined.

It is, furthermore, urged that rubber that has undergone no transformation by manufacture, as the court held to be the case with the merchandise in question, can not be properly said to be "*articles composed of india-rubber.*"

The artificial and strained nature of the argument on this point to show that to be an article of india-rubber a thing must be something other than a mere sheet or piece of that material itself, in other words, that it must be india-rubber and something besides, hardly requires more than a passing tribute to the ingenuity of the learned author of

it, after what has been said with regard to the use of the word "article" in the tariff.

It is next contended that the merchandise in question has undergone a transformation and become a manufacture.

The process of vulcanization does work a transformation in rubber and make a new material. It is admitted, however, that no vulcanization has taken place here, but still it is vaguely contended that a transformation of some sort has occurred, in other words, that crude rubber and dental rubber are *different things.* In support of this position, *which is a pure question of fact,* we have no reference whatever to the testimony, *but many references to adjudged cases.*

The evidence shows that the article in question is rubber. It is called dental rubber. It is true that by the treatment it has gone through it has reached a state which confines its use to the dentist's purposes, but that no more takes from it the character of rubber than the hammering of steel-tire blooms on an anvil (in *Tyre, etc., Wks. Co.* v. *Spalding,* 116 U. S., p. 541) made those blooms any the less steel, although steel adapted for a particular purpose only.

The case of the steel blooms does not appear to be a very fortunate citation for the plaintiff in error, any more than the Shell case (Hartranft *v.* Wiegmann, 121, U. S., 615), both of which cases strongly support the judgment, if, indeed, we are to look to adjudications instead of *testimony* in settling the question of fact whether the merchandise in question has undergone a change of nature and become a different thing from rubber.